IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5683 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAVI HI TECH LTD.

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 5683 of 2002
MR HASIT DILIP DAVE for Petitioner No. 1
MR DN PATEL for Respondents

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 13/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Rule. Mr DN Patel, learned senior standing

counsel waives service of Rule for the respondents.

2. What is challenged in this petition under Article 226 of the Constitution is the order dated 5.10.2001 passed by the CEGAT, Mumbai taking the view that the Commissioner (Appeals) does not have the power under Section 35(1) of the Central Excise Act, 1944 to condone the delay where the appeal is filed beyond the period of six months from the date of communication of the order appealed against as per the provisions which were in force at the relevant time before the amendment reducing the period of limitation.

3. Mr Hasit Dave, learned counsel for the petitioner submits that in Eureka Forbes Ltd. vs. Union of India, 1998 (98) ELT 591 (All.), the Allahabad High Court has held that Section 5 read with Section 29(2) of the Limitation Act, 1963 are applicable to appeals before the Commissioner (Appeals) under Section 35 of the Central Excise Act, 1944 and, therefore, the provisions of sub-section (1) of Section 35 will not preclude the appellate authority from hearing the appeals filed beyond the period of limitation prescribed in Section 35(1) of the Act, if sufficient cause is shown for the delay in filing the appeal; the reading of Section 35 does not show that Section 29(2) and Section 5 of the Limitation Act have been excluded expressly by the provisions of the Central Excise Act, 1944.

4. Mr Hasit Dave further submits, in the alternative, that even if the Commissioner (Appeals) had no power to condone the delay beyond a period of six months from the date of communication of the order, in Mark Auto Industries vs. CCE, New Delhi, 2000 (41) RLT 756 (CEGAT), the CEGAT, New Delhi, presided over by President Hon'ble Mr Justice K.Sreedharan, has held even in such a case the CEGAT, as the second appellate authority, would be well within its jurisdiction to go into the correctness or otherwise of the decision rendered by the primary authority i.e. the adjudicating authority even when the decision of the first appellate authority on the question of limitation is against the assessee.

5. In response to the notice issued by this Court, Mr DN Patel, learned senior standing counsel appears for the revenue and submits that the language of Section 35(1) by necessary implication excludes the power of condonation of delay beyond the period stipulated in Section 35 (1). The learned counsel for the revenue also relies on the decision of the Madras High Court in K.

Muthusamy Pillai vs. ITAT, (1988) 174 ITR 636 where the Court was concerned with the interpretation of a similar provision in Section 256(1) of the Income-tax Act, 1961 and held that when the Income-tax Act has prescribed limitation for an application for reference under Section 256(1) and the Parliament has chosen to lay down sixty days as the period of limitation with power of condonation of delay for thirty days more, beyond that there is absolutely no power with the Tribunal to condone the delay; therefore, a special legislation laying down a particular limitation contrary to the general law of limitation will prevail over the general law of limitation.

6. It appears to us that since neither of the parties had cited the aforesaid decisions and the Tribunal had merely proceeded on the basis that absence of personal hearing before the Collector (Appeals) for deciding the application for condonation of delay in filing the appeal beyond the period of limitation stipulated in Section 35(1) of the Central Excise Act, 1944 did not cause any prejudice, this is a matter which must go back to the Tribunal for deciding the appeal before the CEGAT afresh after giving the parties an opportunity of being heard.

7. The petition is, therefore, allowed. The impugned order dated 5.10.2001 of the Tribunal is hereby quashed and set aside. The Tribunal shall hear Appeal Nos. 3246 to 3251 of 2000/Bom.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.) (K.A. Puj, J.)

sundar/-